89-637

Supreme Court, U.S.
FILED
OCT 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RAYMOND PROZZILLO, JESS BOROWSKI, BETTY GILL, JOHN CARSON and Marion County, West Virginia,
Petitioners,

v.

AMERICAN STATES INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN C. HIGINBOTHAM
Assistant Prosecuting Attorney of Marion County
Marion County Courthouse
Fairmont, West Virginia 26554
(304) 367-5380/(304) 366-2900

October 1989

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED

Whether a person holding funds that may belong to a taxpayer, who pays them to the Internal Revenue Service in response to a levy, should be liable for such payment to a third party that later establishes its ownership of the funds.

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RAYMOND PROZZILLO, JESS BOROWSKI, BETTY GILL, JOHN CARSON and MARION COUNTY, WEST VIRGINIA,
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v.

AMERICAN STATES INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 20, 1989

OPINIONS BELOW

The opinions of the Court of Appeals for the Fourth Circuit and of the District Court for the Northern District of West Virginia, which are not reported, appear in the Appendix at pages 1A - 3A and 4A - 12A, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 20, 1989, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the construction and application of sections 6321, 6322, 6331, 6332, 6343, 6532, and 7426 of the Internal Revenue Code of 1954 (26 U.S.C.). The full text of the relevant portions of such statutes are printed in Appendix C at pages 13A - 18A. Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.)

STATEMENT

On July 1st, 1981, Arthur H. Stover, doing business as P & S Coal and Construction Company entered into a contract for $203,000.00 with the Marion County Commission to do site preparation for a City/County Complex in the City of Fairmont, Marion County, West Virginia. American States Insurance Company provided statutorily required performance and third party payment bonds. On September 21, 1981, the Internal Revenue Service made an assessment of withholding taxes against P & S for the calendar quarter ended June 30, 1981, in the approximate amount of $13,881.36.

About December 1st, 1981, P & S defaulted upon the contract and asked American States to finish the job. By letters dated December 15th, 1981, both P & S and American States notified the Marion County Commission of the default and requested retention of all contract balances and retainages, which was $60,377.00.

On July 9th, 1982, notices of levy in the amount of $17,546.36 were issued by Emerson A. McGrew, IRS Revenue Officer, and were served upon the Marion County Commission and American States Insurance Company. The notice of levy was received in Marion County on July 12th, 1982. Sometime between July 12th and July 26th, 1982, John P. Carson, Administrative Assistant to the Marion County Commission, telephoned Revenue Officer McGrew and learned that American States had requested a hold on any payments for the contract, and had denied liability on the part of American States Insurance Company for payment on the notice of levy. Thereupon by a letter dated July 26th, 1982, Mr. Carson requested a legal opinion from Marion County Prosecuting Attorney Charles E. Anderson whether the County Commission should pay the levy. By letter dated August 4th, 1982, Prosecuting Attorney Anderson informed Mr. Carson that the levy should be paid. Meanwhile, E. Joel Wesp, Counsel for American States, began negotiations with the Internal Revenue Service to obtain relief from the levy with a four page letter dated August 17th, 1982, to Revenue Officer McGrew outlining the basis for American States' contest of the levy. This letter indicated knowledge on the part of the Respondent that notices of levy had been served by the Internal Revenue Service upon one or more owners of projects on which it was the performance and payment bond surety. No copy was sent to the Marion County Commission.

On September 20, 1982, Marion County issued a check in the amount of $17,546.36 to the Internal Revenue Service in response to the levy. A Form 668-R Release of Levy dated September 24th, 1982, was sent to and received by American States on September 28th, 1982.

By letter dated October 13th, 1982, the county Commission notified American States that the Commission

was aware of certain unpaid bills for services and that these bills would be paid by the Commission unless exception was made. American States did make exception by telegram dated October 21st, 1982. By letter dated November 5th, 1982, Prosecuting Attorney Anderson further advised the County Commission to form an escrow account for the balances and retainages and to make no payment from the account without the approval of American States. The balance was paid into an escrow account. A Certificate of Completion was issued November 4, 1982. Between December 17, 1982 and November 21, 1984, a total of $26,470,20 was disbursed from the escrow account and there was no dispute regarding the payments or balances with the exception of a single $3,000.00 payment made to the County Commission for "extraordinary administrative and legal expenses incurred by the Commission" paid approximately December 20th, 1982. On February 22nd, 1983, counsel for American States appeared before the Marion County Commission regarding payments to be made to American States or other creditors and by letter dated February 25th, 1983, to Prosecuting Attorney Anderson, expressed his concern regarding the payment of the IRS notice of levy and requested a rationale therefor.

Respondent then filed this diversity action on January 30,1985, in the United States District Court for the Northern District of West Virginia to recover $35,689.66 in retainages, contract balances and third-party payments. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1332 because of the diversity of citizenship, petitioners being citizens of the State of West Virginia and respondent being a citizen of the State of Indiana, and there being more than $10,000.00 in controversy. An additional basis for jurisdiction was alleged

under 28 U.S.C. § 1343, in that the respondent was bringing the action for relief under the Civil Rights Act, 42 U.S.C. § 1983. The District Court entered judgment in favor of respondent in the amount of $36,866.80, plus interest, which amount included the $17,546.86 paid to the Internal Revenue Service. The District Court found the petitioners liable for such payment on the grounds that seven months prior to the service of the notice of levy the funds in question had been assigned to the respondent and were no longer property of the taxpayer subject to seizure for his taxes. The payment was therefore held to be wrongful and the petitioners subject to liability. The Court of appeals affirmed on essentially the same grounds: that the petitioners knew of the assignment by the construction company to the respondent and had no right to treat the retained funds as property of the construction company subject to its command and to the levy of the Internal Revenue Service.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts In Principle With A Decision Of This Court As To The Legal Responsibilities Of Persons Holding Funds That May Belong To A Taxpayer And Upon Whom An Internal Revenue Levy Is Served.

The Court of Appeals has decided an important question of federal law in a way that conflicts with a decision of this court and one other circuit. The question presented has great administrative importance and involves substantial amounts of revenue, for the Internal Revenue Service serves over a million levies per year. Review by this Court is therefore appropriate.

In 1985, this Court, in a case also involving the rights of nontaxpayer third parties to funds levied upon, had occasion to give support to the concept of discharge from

liability of persons honoring a levy. In *United States* v. *National Bank of Commerce*, 72 U.S. 713 (1985), the Service levied upon a joint bank account for taxes due from only one of the three codepositors. Upon refusal of the Bank to comply with the notice of levy, the Service brought an action under section 6332 for failure to honor the levy. The taxpayer codepositor, under Arkansas law, had the right to withdraw all of the funds in the account notwithstanding the fact that the other codepositors might have ownership rights in such funds. The Service contended that this right to withdraw all of the funds was a property right that was subject to levy under section 6331. The Bank contended that the Service must first demonstrate that the taxpayer was in fact the true owner of all the funds before the levy could be enforced. The Court, in holding for the Service, had occasion to review the entire statutory system of tax collection, and along with it the liability to nontaxpayers of a person honoring a levy. Specifically, the Court noted a "pay now, litigate later" policy emerging from the synthesis of these code sections. Its statements, beginning at page 728, are particularly instructive:

> In its understandable concern for Ruby's and Neva's property interests, the Court of Appeals has ignored the statutory scheme established by Congress to protect those rights. Crucially, the administrative levy, as has been noted, is only a provisional remedy. 'The final judgment in [a levy] action settles no rights in the property subject to seizure.' *United States* v. *New England Merchants National Bank*, 465 F. Supp. 83, 87 (Mass. 1979). Other claimants, if they have rights, may assert them. Congress recognized this when the Code's summary-collection procedures were enacted, S. Rep. No. 1708, 89th Cong., 2nd Sess. 29 (1966), U.S. Code Cong. & Admin. News 1966, p. 3722, and when it provided in § 7426, of the

> Code, 26 U.S.C. § 7426, that one claiming an interest in property seized for another's taxes may bring civil action against the United States to have the property or the proceeds of its sale returned. Congress also has provided, by § 6343(b), an effective and inexpensive administrative remedy for the return of the property. See Treas. Reg. § 301.6343-1(b)(2), 26 CFR § 301.6343-1(b)(2) (1984).
>
> Congress thus balanced the interest of the Government in the speedy collection of taxes against the interests of any claimants to the property, and reconciled those interests by permitting the IRS to levy on the assets at once, leaving ownership disputes to be resolved in a post-seizure administrative or judicial proceeding. See, *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d 733, 739 (CA5 1980); *Valley Finance, Inc.* v. *United States*, 203 U.S.App.D.C. 128, 136-137, 629 F.2d 162, 170-171 (1980), cert. denied, 451 U.S. 1018, 101 S. Ct. 3007, 69 L.Ed.2d 389 (1981). Its decision that certain property rights must yield provisionally to governmental need should not have been disregarded by the Court of Appeals. *Nor would the bank be exposed to double liability were it to honor the IRS levy. The Code provides administrative and judicial remedies for codepositors against the Government, and any attempt to secure payment in this situation from the bank itself would be contrary to the federal enforcement scheme.* (Footnotes omitted) (Emphasis added)

The Court is apparently indicating that the administrative and judicial remedies provided to third parties for protection of their rights in a wrongful levy situation eliminate the need for a remedy against the person honoring the levy. Such a rule would encourage rapid collection of taxes and yet not deprive third parties of adequate relief on the securing of their property.

Lower courts, both state and federal, have consistently held stakeholders not liable to nontaxpayer third parties

claiming ownership of funds the stakeholders had previously paid to the Service pursuant to a levy.

In *Determan* v. *Jenkins*, 111 F. Supp. 604 (N.D. Ga. 1953), a sheriff took possession of an amount of currency found in the wreckage of an airplane and later surrendered it to the Service pursuant to a notice of levy. In a suit against the sheriff by a nontaxpayer third party claiming ownership of the funds, the court declined to find liability. In that case, as in the instant one, the plaintiff argued that the property was not subject to levy because it belonged to the plaintiff and not to the taxpayer. This argument was rejected because it would have required the party upon whom levy was made to ascertian the true title to the money before delivering it to the Service. The court thus lifted the risk of that decision from the innocent stakeholder and in so doing gave support to the policy of speedy collection of the revenue. The rule of this case was next acknowledged in *Fine Fashions, Inc.* v. *Moe*, 172 F. Supp. 547 (S.D. N.Y. 1959), although the issue of the stakeholder's liability to a third party was not before the court.

Fourteen years after *Determan*, in *Bolling* v. *Samples*, 159 S.E.2d 727 (Ct. App. Ga. 1967), the Georgia Court of Appeals also adopted the rule that a person making payment pursuant to a levy was discharged from liability to a third party. There, the taxpayer had, prior to the date of the levy, assigned the debt to the person who brought the action against the party levied upon.

The next case to deal with liability to a third party was *DiEdwardo* v. *First National Bank of Bath*, 442 F. Supp. 499 (E.D. Pa. 1977). There the Service levied upon bank deposits carried in the names of the plaintiffs for taxes of another person. The Service contended later that the

plaintiffs were merely nominees of the taxpayer and that the taxpayer was the true owner of the funds. The Bank paid the money over notwithstanding the fact that there had not been any legal determination that the funds belonged to the taxpayer. In finding the Bank not liable, the court acknowledged the long standing rule that payment pursuant to a notice of levy is a complete defense to any action by a taxpayer, citing *United States* v. *Eiland*, 223 F.2d 118 (4th Cir. 1955), and extended such protection to suits by third parties. The court also noted that the plaintiffs had the right to directly sue the United States under section 7426 wherein all questions could be resolved.

Although different rationales were used in *Determan* and *DiEdwardo*, these cases show that where the issue of liability has been raised, federal courts have exonerated the person honoring the levy.

Finally, the Sixth Circuit, in *United Pacific Insurance Company* v. *Laurel County*, 805 F.2d 628 (6th Cir. 1986), *cert. denied*, ___ U.S. ___, 108 S. Ct. 72 (1987), a case very similar to the instant one, held that honoring a notice of levy was a complete defense to a suit by a third party claiming ownership of the fund.

In the present case the focus should be from the viewpoint of the stakeholder, Marion County, at the time the notice of levy was served on July 9, 1982. According to the notice of levy the tax was assessed on September 21, 1981, at which time a federal tax lien arose. Sections 6321 and 6322. This lien attached to all property and rights to property of the taxpayer, including after-acquired property. *Glass City Bank* v. *United States*, 326 U.S. 265 (1945). The tax lien arose *prior* to the default of P & S and thus encumbered its rights under the construction con-

tract before they were assigned to the respondent. Other uncertainties at the time of the notice of levy also clouded the effectiveness of the assignment and the extent of the taxpayer's interest in the contract proceeds.

The contract was being funded by the United States acting through the Farmers Home Administration. The assignment may have been invalid by reason of the Anti-Assignment of Claims Statute, 31 U.S.C. § 3727.

Section 23.1 of the Site Development Contract provided that neither the contractor (taxpayer) nor the owner (Marion County) shall sell, transfer, assign, or otherwise dispose of the contract or any portion thereof, or any right, title or interest therein, or any obligations thereunder, without written consent of the other party. Marion County had not given written consent to the taxpayer's assignment to American States. Consequently, doubt was cast upon the validity of the assignment by the contract itself.

Section 18.2 of the contract provides that in the event the contractor violates any provisions of the contract (such as failure to pay suppliers, or failure of performance) the owner may terminate the contract. The contractor's right to payment is not totally cut off at that time, however. At the completion of the contract, if the unpaid balance of the contract price exceeds the direct and indirect costs of completing the contract, including compensation for additional professional services, such excess shall be paid to the contractor. The Certificate of Substantial Completion establishes that the contract was not completed until November 8, 1982, almost four months after the notice of levy was served. Consequently, the taxpayer's entitlement to some portion of the contract proceeds could not have been determined with absolute certainty until that later date.

Whether and to what extent these uncertainties may have given the Internal Revenue Service an interest in the funds being held by Marion County could very well have become the subject of protracted litigation if it had not promptly honored the notice of levy. If such litigation ultimately had been resolved in favor of the Internal Revenue Service, Marion County could have been subject to substantial penalties. See section 6332. The rationale of the *Determan* case is that an innocent stakeholder should not be exposed to the risk of having to determine ownership of the funds.

Admittedly, Marion County, and other similarly situated stakeholders could file an interpleader suit and let a court determine ownership. Such course of action, however forces the stakeholder through no fault of its own to incur costs and attorney's fees. In a case such as the instant one, where the tax liability exceeds the interpleaded fund, the stakeholder cannot recover its legal expenses from the fund if the Service prevails. *United States* v. *Liverpool & London & Globe Insurance Co.*, 348 U.S. 215 (1955). In any event, it is more the obligation of the person claiming ownership of the property to take the initiative rather than the stakeholder, and either to file a claim with the Internal Revenue Service under section 6343, or to bring an action under section 7426. The law has always imposed a duty on the owners of property to exercise some reasonable effort to care for it. *Dieckmann* v. *United States*, 550 F.2d 622, 624 (10th Cir. 1977).

In the instant case, American States was aware as early as its letter of August 17, 1982, that notices of levy had been served upon one or more owners of projects on which it was performance and payment bond surety, including Marion County. American States also received a Form 668-R, Release of Levy, on September 28, 1987, indicat-

ing that, in some manner, the notice of levy had been satisfied. By a letter dated February 25, 1983, counsel for American States indicated its awareness, at some time prior thereto, of the payment by Marion County of the Internal Revenue Service notice of levy.

Under section 6532(c)(1), a suit under section 7426 for wrongful levy must be begun no later than nine months from the date of the levy. In the instant case, this would have been April 9, 1983. Section 6532(c)(2) provides further that if a request is made for the return of property under section 6343(b), the aforementioned nine-month period shall be extended for a period of twelve months from the date of such request or for a period of six months from the date of disallowance of the request by the Internal Revenue Service, whichever is shorter.

As of February 25, 1983, the date of its counsel's letter, American States still had forty-three days in which to file with the Internal Revenue Service a simple request for return of the payment made by Marion County or to file suit under section 7426. This request would have extended the period for American States to file an action under section 7426 for a minimum of six months. During such period it could have entered into negotiations with the Internal Revenue Service for return of the money and perhaps resolved the matter short of litigation. As indicated in *National Bank of Commerce* this is precisely what is envisioned by the statutory processes provided under sections 6343 and 7426.

American States probably was aware of the payment to the Internal Revenue Service long before February 25, 1983. It was certainly aware of the notice of levy served upon Marion County soon after July 9, 1982. Notwithstanding this knowledge, it sat on its rights, and whether

because of indifference, negligence, or other unknown reasons, failed to avail itself of these remedies which have been provided by Congress since 1966. The legal system should not visit the failure of American States to avail itself of these remedies upon the innocent stakeholder paying under the levy.

2. The Decision Below Conflicts With The Decision Of Another Court Of Appeal As To The Liability Of A Stakeholder To A Nontaxpayer Third Party Who Claims Ownership Of Funds Paid By The Stakeholder To The Internal Revenue Service Pursuant To A Notice Of Levy.

In *United Pacific Insurance Company* v. *Laurel County*, 805 F.2d 628 (6th Cir. 1986), *cert. denied*, ___ U.S. ___, 108 S. Ct. 72 (1987), Laurel County, Kentucky, had contracted with Y & S Construction Company to construct a high school in London, Kentucky. For the period July through December 1969, Y & S had failed to remit withholding taxes for its employees in the approximate amount of $185,000.00. On February 4, 1970, the Internal Revenue Service filed a notice of tax lien against Y & S for this amount. On or before March 4, 1970, Y & S defaulted in the performance of the construction contract when it was about seventy-five percent completed. On March 15, 1970 Y & S sent a notice to Laurel County that all funds due or about to be due on the contract be paid to its surety, United Pacific Insurance Company. On or about April 17, 1970, the project architect certified that $116,000.00 was due and payable to Y & S. On May 15, 1970, United Pacific made demand on Laurel County for all sums coming due under the contract. Three days later a notice of levy was served on Laurel County by the Internal Revenue Service in the approximate amount of $100,000.00 for taxes due and owning by Y & S. On May 18, 1970, after consulting with two county attorneys,

Laurel County paid the amount of the levy to the Internal Revenue Service. On that same day it also advised United Pacific of the payment. In 1974, more than nine months after the notice of levy, United Pacific brought an action against Laurel County for damages in the amount paid by it pursuant to the notice of levy. Laurel County filed a third party complaint against the United States which was later dismissed because it had not been brought within the nine-month period specified in section 6532(c)(1).

The district court found for United Pacific on the ground that under Kentucky law the funds were held in trust for the unpaid materialmen and had never become property of the taxpayer. In so ruling, the court noted that section 6332(d) does not relieve a person mistakenly or erroneously making payment to the Internal Revenue Service pursuant to a notice of levy from liability to the true owner of the funds.

The Sixth Circuit first rejected the lower court's holding that the property was held in trust for the benefit of materialmen and concluded that the taxpayer at the time of levy did have an interest in the fund subject to levy. United Pacific failed to argue in the alternative that the taxpayer would still not have had an interest in the contract proceeds based upon its default and failure to pay its materialmen, although the record before the court clearly supported such a position. The court then held that where a custodian of a taxpayer's property or rights to property has, *at the time of levy,* no defense for failure to comply with the levy (i.e., the custodian cannot claim that it is neither "in possession of" nor "obligated with respect to" property of the taxpayer or that the taxpayer's property is subject to a prior judicial attachment or execution) and thus honors a lawful Internal Revenue Service levy, the

custodian has a valid and complete defense under federal law to claims of third parties with interests in the property surrendered.

In the instant case, at the time the levy was made, the proceeds of the construction contract were not under attachment or execution. Moreover, substantial uncertainty existed as of July 9, 1982, as to what portion of the contract proceeds may have constituted property of the taxpayer. The taxpayer's purported assignment of its interest thereunder was subject to a prior, existing federal tax lien, the assignment may have been invalid because Marion County had not consented to it in writing, and under the contract, the taxpayer may have been entitled to excess proceeds, a fact not determinable until the later completion of the project.

It is clear the Sixth Circuit implicitly recognized that in any levy situation subsequent litigation may determine the taxpayer had no rights in the property. Nevertheless, it focused upon the situation as it existed *at the time of levy,* prior to a judicial resolution of the respective interests in the subject property. Its decision, therefore, is in direct conflict with that of the court below.

3. The Decision Below Raises Significant and Recurring Problems Concerning Application of the Federal Tax Lien Act.

In its Petition for Writ of Certiorari filed with respect to *United States* v.*National Bank of Commerce,* 472 U.S. 713 (1985), the United States, at page 19, footnote 13, thereof set forth statistics obtained from the Internal Revenue Service concerning the number of levies served during the fiscal years 1981, 1982, 1983, and the first half of 1984. The numbers served were, respectively, 740,103; 1,058,452; 1,390,900; and, 741,900. Presumably, the

number of levies being served currently per fiscal year is equal to or more than those set forth above. In any event, the amount is substantial.

It is important to note that the statutory scheme regarding levies and remedies for third party claimants indicates Congressional intent to effect a speedy collection of the revenue. Section 6332 provides for substantial penalties for refusal to pay which has been characterized as a coercive purpose "which seeks to foster swift tender of property which has been levied upon." See *Flores* v. *United States*, 551 F.2d 1169, 1174 (9th Cir. 1977). Section 6532(c) further provides that actions under section 7426 for wrongful levy must be commenced within nine months from the date of the levy. "Congress was clearly concerned that the levy contests more than nine months after the levy would prevent ultimate collection of the tax, thereby endangering the federal treasury. The problems of administration become inordinately complex after a levy is set aside for the Government must begin anew to collect the delinquent tax. Physical collection becomes far less likely, as taxpayers may have disappeared or disposed of their assets in the intervening period." *Gordon* v. *United States*, 649 F.2d 837, 843 (Ct. Cl. 1981). Thus, federal decisional law should support this clear statutory intent by encouraging prompt payment of monies levied upon through the elimination of liability for such payment.

In the absence of a rule providing for discharge of liability upon payment, the person levied upon has no certain or reasonable alternatives.

As pointed out previously, the filing of an interpleader action by the possessor of the funds is likewise not a certain or reasonable solution. It is only certain if the

stakeholder is aware of all potential claimants to the fund and names them parties to the interpleader. Secondly, it is not reasonable to require the innocent possessor to incur substantial legal expenses in the filing of an interpleader action when such expenses may not be recoverable from the fund. In cases where it is ultimately determined that the federal tax lien has priority and is equal to or exceeds the fund, the interpleading stakeholder is not permitted to recover its legal expenses therefrom. *United States* v. *Liverpool & London & Globe Ins. Co.*, 348 U.S. 215 (1955).

The other alternative available to the person levied upon is to refuse to honor the levy. Under section 6332(c), however, the person could be subject to penalties equal to the amount not paid (not to exceed the taxes to be collected by the levy) and an additional fifty percent thereof if the refusal to pay was unreasonable. Thus, if this course of action is followed, the person is exposed to the risk that it will later be determined that the taxpayer was the true owner of the funds and the levy was valid, with the resultant imposition of the penalties. For a thorough discussion of the dilemmas confronting persons upon whom a levy is made the Court's attention is invited to Plumb, *Federal Liens and Priorities—Agenda for the Next Decade* (pt. III), 77 Yale L.J. 1104, 1155 (1968).

As indicated above, neither of these alternatives are certain or reasonable, and would serve only to impede the swift collection of the revenue. It is apparent, therefore, that there exists substantial policy reasons for a general discharge from liability to third parties upon payment pursuant to a levy.

The Internal Revenue Code provides some relief to stakeholders paying pursuant to a levy, but fails to

address situations where it is ultimately determined the taxpayer had no property interest in the subject funds. In 1966, when the Federal Tax Lien Act was passed, section 6332(d) provided for the first time that any person in possession (or obligated with respect to) property subject to levy upon which levy has been made, who surrenders that property to the Internal Revenue Service will be discharged from liability to the taxpayers.

In 1988, under Pub. L. 100-647 (TAMRA), the foregoing section was redesignated as section 6332(e), effective for levies issued on or after July 1, 1989, and provides as follows:

> (e) EFFECT OF HONORING LEVY.—Any person in possession of (or obligated with respect to) *property or rights to property subject to levy* upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1) shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment. (Emphasis added)

"Property or rights to property subject to levy" is limited by section 6331(a) to property and rights to property belonging to the taxpayer or upon which there is a tax lien. In any case where subsequent litigation determines (1) that the taxpayer never had any rights in the property levied upon, or (2) that the property was transferred from the taxpayer before the tax lien came into existence, section 6332(e) would offer no relief to the stakeholder who mistakenly, although in good faith, honors the levy. This section would only give relief where it is later determined that the claim of a third party had priority over the

federal tax lien with respect to property that did, in fact, belong to the taxpayer.

In the construction contract area alone there are numerous situations where, because of the taxpayer's default in performance or failure to pay suppliers, he will have no property interest in the proceeds of the contract. In other areas such as bank deposits with nontaxpayer co-depositors as in the *National Bank of Commerce* case, the same problem will arise to confront the thousands of banks that are served with notices of levy on a daily basis. See page 19, footnote 13, in the Petition for Writ of Certiorari in *National Bank of Commerce*.

In *Bull* v. *United States*, 295 U.S. 247, 259 (1935), this Court declared that "taxes are the life-blood of government, and their prompt and certain availability an imperious need." The administrative levy system is a time-honored, congressionally-authorized collection technique designed to ensure that this need is promptly and equitably met. The decision below poses a serious threat to the efficacy of that system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN C. HIGINBOTHAM
Assistant Prosecuting Attorney of Marion County
Marion County Courthouse
Fairmont, West Virginia 26554
(304) 367-5380/(304) 366-2900

October 1989

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 1989, three copies of the Petition for Writ of Certiorari were mailed postage prepaid, to E. Joel Wesp, Esq., Wesp & Osterkamp, LeVeque Tower, the Thirty-Third Floor, 50 West Broad Street, Columbus, Ohio 43215, Counsel for Respondent.

I further certify that all parties required to be served have been served.

JOHN C. HIGINBOTHAM
Assistant Prosecuting Attorney of Marion County
Marion County Courthouse
Fairmont, West Virginia 26554
(304) 367-5380/(304) 366-2900

APPENDIX

APPENDIX

APPENDIX A

Nos. 88-1107/1114

United States Court Of Appeals

FOR THE
FOURTH CIRCUIT

AMERICAN STATES INSURANCE COMPANY
Plaintiff-Appellee,

v.

RAYMOND PROZZILLO; JESS BOROWSKI; BETTY GILL; JOHN CARSON; MARION COUNTY, WEST VIRGINIA,
Defendants-Appellants

v.

INTERNAL REVENUE SERVICE
Third Party Defendant

v.

AMERICAN STATES INSURANCE COMPANY,
Plaintiff-Appellant,

v.

RAYMOND PROZZILLO; JESS BOROWSKI; BETTY GILL; JOHN CARSON; MARION COUNTY, WEST VIRGINIA,
Defendants-Appellees

v.

INTERNAL REVENUE SERVICE
Third-Party Defendant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT CLARKSBURG.
William M. Kidd, United States District Judge.
CA-85-11-C-K.

ARGUED: February 9, 1989

DECIDED: July 20, 1989

Before HALL and PHILLIPS, Cicuit Judges; and HAYNSWORTH, Senior Circuit Judge.

Before: HALL and PHILLIPS, Circuit Judges; and HAYNSWORTH, Senior Circuit Judge.

John Carder Higinbotham, Assistant Prosecuting Attorney (J. Montgomery Brown, Prosecuting Attorney on brief) for Appellants. E. Joel Wesp (Wesp, Osterkamp & Stratton on brief for Appellee).

PER CURIAM:

American States Insurance Company was the surety on construction bonds filed on behalf of Arthur H. Stover doing business as P & S Coal Construction Company. The construction company had agreed to do site work on a county construction project in Marion County, West Virginia. The bonds secured the construction company's performance and payment.

The construction company defaulted in its performance, and the appropriate officials of Marion County were informed that American States had received an assignment by the construction company of all balances and retainages by county officials for the account of the construction company.

Thereafter, the Internal Revenue Service purported to levy upon those funds as the property of the construction company for some $17,000 in taxes due by the construction company. The county paid over the funds to the Internal Revenue Service. In addition, it paid to itself $3,000 to reimburse itself for claimed extra expense to which it had been put.

The insurance company brought this action to recover the full amount of the retained funds that became due upon completion of the contract.

Marion County admitted the facts. It made no claim that it was entitled to pay itself the $3,000, but it did insist that it was entitled to deduct the amount it had paid to the Internal Revenue Service. It treated the claim of the insurance company as no more than a competing claim upon the fund. It took the position that it had no defense to the claim of the United States. In doing so it completely ignored the assignment of the construction company to the insurance company of all the construction company's interest in the funds withheld by Marion County.

There is no merit in the county's appeal. Summary judgment for the plaintiff was properly entered. The county knew of the assignment by the construction company to the insurance company and had no right to treat the retained funds as property of the construction company subject to its command and to the levy of the United States.

In addition to its contract claims, the insurance company alleged a violation of section 1983. It claimed a deprivation of its property without due process of law and done under the color of state law. It alleged the section 1983 claim in an attempt to obtain an award of attorney's fees under 42 U.S.C. section 1988.

The district judge denied the section 1983 claim upon the ground that the county's diversion of funds did not amount to a constitutional tort. Whether or not the district court was right on that score, an award of attorney's fees under section 1988 is clearly discretionary. Whether or not the district court had the power to award such fees, it clearly had the discretionary right to decline to award them. We therefore find no merit in the plaintiff's cross appeal dealing with the section 1983 claim.

AFFIRMED.

APPENDIX B

(Filed April 20, 1988)

NO. 85-0011-C(K)

United States District Court

NORTHERN DISTRICT OF WEST VIRGINIA AT CLARKSBUG

AMERICAN STATES INSURANCE COMPANY
Plaintiff.

v.

RAYMOND PROZZILLO; *et al.*
Defendants and Third-Party Plaintiffs

v.

INTERNAL REVENUE SERVICE OF THE UNITED STATES GOVERNMENT
Third-Party Defendant

MEMORANDUM OPINION

This matter is pending before the Court on plaintiff, American States Insurance Company's ("American States"), motion for summary judgment filed on November 19, 1987. The defendants have not filed a response or otherwise opposed American States' motion.

Following is the statement of undisputed material facts:

STATEMENT OF FACTS

On or about August 22, 1980, American States entered into an "Agreement of Indemnity" with Arthur S. Stove d/b/a P & S

Coal Construction Company ("P & S") which provided, *inter alia*, that, effective upon breach of any contract referred to in any surety bond issued by American States pursuant to the agreement, that P & S assign, transfer and set over to American States all of the rights of P & S in, and growing in any manner out of, and contracts referred to in the bond. Such assignment included any and all percentages retained and any and all sums that may be due or later become due on account of any and all contracts referred to in the bond.

Thereafter, on or about July 1, 1981, P & S entered into a contract with defendant Marion County and the Marion County Commission for development of a city-county complex to be located in Fairmont, West Virginia. At all times during the contract between P & S and defendant Marion County, American States provided payment and performance surety bonds on behalf of P & S for the performance of work and material under terms of the agreement.

On December 1, 1981, P & S Coal Construction Company defaulted on its obligations under its contract with defendant Marion County and requested that American States meet its bonded obligations as surety, which obligations were subsequently met by it. American States became subrogated to the rights and obligations of P & S under the Marion County contract on December 1, 1981, and it took immediate assignment from P & S of all contract balances, retainages and payments in progress.

P & S notified defendant Marion County in writing on December 15, 1981, of its default under the Marion County contract and the assignment of such contract balances and retainages to American States. P & S further requested Marion County to honor American States' requests for such contract balances and retainages as such amounts became due under the contract.

American States also notified defendant on December 15, 1981, that all contract balances, retainages and payments in progress were to be withheld until American States' surety had

fulfilled its obligations under the bond and made claims for such balances. At the time they received notice of American States' interest in the contract balance and retainages, defendants were holding approximately $60,000 under the Marion County contact which had been assigned by P & S to American States.

As early as December 30, 1981, American States began making disbursements under its bond for the benefit of unpaid subcontractors and materialmen and for the completion of the Marion County project. Prior to any disbursements from the contract balance and retainage fund by Marion County, American States had paid under its bond in excess of $140,000.

On or about July 9, 1982, the Internal Revenue Service ("IRS") issued a Notice of Levy on Wages, Salary, and other income "belonging to this taxpayer (Arthur H. Stover dba P & S Coal Co.) that you now possess or for which you become obligated." The notice of levy was received by Marion County on July 12, 1982. American States itself received a notice of levy. Ten months prior to the date on which Marion County received notice of levy, American States had succeeded to all rights in the contract balances and retainages being held by Marion County. American States notified the IRS of that fact and disputed the IRS levy.

A county administrator telephoned the IRS upon receipt of the levy and learned from an IRS agent that American States had requested a hold on any payment from the Marion County contract and denied any liability on the part of the bonding company of this Notice of Levy. The county administrator was also aware from the earlier notice from American States that it then had an interest in the funds being retained by Marion County on the contract.

On July 26, 1982, the prosecuting attorney was asked to render an opinion as to whether the County should pay the IRS levy. In a letter dated August 4, 1982, the prosecuting attorney opined that Marion County should pay the levy and deduct this from the amount "owing to P & S Coal" for their contract period. The prosecuting attorney know of American States'

position about payment of the levy out of the contract balances; but he did not make any effort to contact American States to advise it of his opinion, nor to learn anything more about American States' position. He was unaware of the prior assignment of contract balances and retainages by Art Stover and P & S to American States; and he did not consider the impact of the assignment of the contract balances in rendering his opinion.

On or about September 17, 1982, Marion County issued its check for $17,546.36 to the IRS in response to the IRS levy.

American States was never given any advance notice of Marion County's intent to pay the IRS levy and deduct the amount of the payment from the contract balances and retainages.

On September 8, 1982, American States was notified about the termination of contract and the disposition of the contract balances. This notice clearly indicated that the contract balances and retainages were being held pending completion of the project. Nothing was said about the impending payment of funds out of the contract balances to IRS.

On October 13, 1982, American States was first notified of Marion County's intent to make disbursement from the contract balances. In this letter, Marion County gave American States ten days to contest any of the proposed payments. This letter said nothing about any prior disbursement of funds to the IRS out of the contract balance account of American States.

On October 21, 1982, American States sent a telegram to Marion County noting American States' exception to any and all proposed payments being made out of the contract balances.

On November 4, 1982, the prosecuting attorney issued another opinion letter in which he changed his opinion as to American States' rights to the contract balances and retainages. He expressly advised the County that, in establishing the escrow account for the balance of the contract proceeds,

"*no payment can be made from this account without the approval of American States Insurance company.*"[1] The prosecuting attorney came to the conclusion that no payment should be from the account without the approval of American States because he knew American States was then subrogated to the rights of P & S Coal. In that regard he stated that:

> Based on the information that I had at that time, I felt that American States was subrogated to the rights of P & S Coal, as far as the monies were concerned, and that you could not make those payments without American States Insurance Company's permission.[2]

Despite the express advice, the County persisted in its failure to credit the contract balance account with the amount paid over to the IRS. In addition, the County made another disbursement of $3,000 from the contract balances for "extraordinary administrative and legal expenses incurred by the Commission."

Thereafter, on April 18, 1983, American States demanded from defendants payment of contract balances and retainages (then believed to be in the amount of $35,689.66) plus interest. However, between the notice of assignment sent to defendants on December 15, 1981, and the formal demand for the contract balance on April 18, 1983, defendant had paid the sum of $17,546.86 to the IRS in response to an IRS levy and deducted $3,000 from the balance of the contract for additional "administrative and legal costs" contrary to contract provisions.

Defendants continue to hold the sum of $16,320.44 and have refused to release even that sum to American since completion of the contract, notwithstanding the defendant's admission that, according to their view, American States became entitled to the contract balance on December 21, 1984.[3]

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[1] (C. Anderson Deposition Exhibit D-12.)

[2] (C. Anderson Deposition, Pg. 21, 11. 14-18.)

[3] Memorandum Appendix S, Defendant's Answer to Plaintiff's Interrogatory No. 27.

Discussion

In its complaint American States seeks recovery of $35,689.66 in retainages, contract balances and payment held and made by the defendants. It is undisputed that American States acted as surety on this construction project. American States issued the payment and performance bonds for the construction contract between P & S and Marion County Commission. Upon P & S's default on the contract, American States stepped in and completed the project. The numerous relevant contract documents are a part of the record herein.

The Agreement of Indemnity entered into between American States and P & S reads, in pertinent part:

Assignment

> (THIRD) The contractor, [P & S] the Indemnitors hereby consenting, will assign, transfer and set over, and does hereby assign, transfer and set over to the Surety, [American States] as collateral to secure the obligations in any and all of the paragraphs of this Agreement and any other indebtedness and liabilities of the Contractor to the Surety, whether heretofore or hereafter incurred, the assignment in the case of each contract to become effective as of the date of the bond[s] [payment and performance bonds] covering such contract, but only in the event of (1) any abandonment, forfeiture or breach of any contracts referred to in the Bonds or of any breach of any said Bonds: . . . (e) Any and all percentages retained and any and all sums that may be due or hereafter become due on account of any and all contracts referred to in the Bonds and all other contracts whether bonded or not in which the contractor has an interest.

American States indicates that it is entitled to the contract proceeds and retainages as a result of its subrogation rights arising from its fulfilling all responsibilities under the bonds. The Court agrees with this contention. It is undisputed American States, as surety, completed the project.[4]

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[4] The defendants admitted that a certificate of substantial completion was issued by the project architect on or about November 4, 1982.

The United States Supreme Court has stated that a "[s]urety, which paid labor and material bills incurred by a governmental contractor, had ownership of an equitable lien in, or a prior right to retained percentages from the date of execution of the bond and contract on the theory of subrogation alone." *Logan Planning Mill Co.* v. *Fidelity and Casualty of N.Y.*, 212 F. Supp. 906, 916 (S.D. W. Va. 1962) (citing, *Pearlman* v. *Reliance Insurance Company*, 371 U.S. 132, 83 S.Ct. 232 (1962)).

The equitable lien created by American States' performance as surety under the bonds is bolstered by the legal rights stemming from the express contractual assignment provision quoted above.

Under West Virginia law "[s]ubrogation, being a creation of equity, will not be allowed except where the subrogee [American States] has a clear case of right and no injustice will be done to another." *Ray* v. *Donohew*, 352 S.E.2d 729 (W. Va. 1986) (citations omitted). Here, American States has a clear right to the contract proceeds in question. The Court sees no injustice being done by invoking subrogation in this case.

Moreover, the equitable rights of American States relates back in time to the execution of the specific bonds. *Western Casualty and Surety Company* v. *Brooks*, 362 F.2d 486, 490 (4th Cir. 1966). The two bonds were issued by American States on July 1, 1981. Thus, the subrogation rights acquired by American States related back and attached as of July 1, 1981.[5] Given that American States had acquired subrogation rights upon completion of the Marion County project and the defendants fully recognizing that certain contract proceeds had been retained which arguably inured to the benefit of American States, the defendant Marion County Commission, in paying a portion of the retained proceeds to the IRS under the Notice of

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[5] The Court notes that the IRS Notice of Levy was dated July 9, 1982, one year after the issuance of the payment and performance bonds by American States.

Levy for P & S did so at its own risk. It remains undisputed that the IRS levy was received by Marion County on July 12, 1982, some seven months following P & S's default and after it received notice of the assignment to American States.

The Court is of the opinion that although there were mechanisms available to protect the defendants from improper disbursement of the retained proceeds, none were utilized. The amount disbursed to the IRS under the P & S levy was $17,546.86. However, the Court primarily is concerned with deciding whether American States is entitled to judgment as a matter of law in the amount sought. In addition, defendants disbursed another $3,000 from the contract balances earmarked as legal and administrative expenses. This disbursement was apparently made without either the knowledge or consent of American States and against the advice of defendants' counsel. It remains undisputed that there was no contractual provision authorizing the $3,000 disbursement. Defendants' lack of opposition to this motion is deemed to have been an admission of the material facts stated by American States in its memorandum. *Local Court Rule* 2.07 (N.D. W. Va.).

Upon the undisputed material facts, the Court concludes, in accordance with the mandates of *Celotex Corp.* v. *Catrett*, 106 S.Ct. 2548 (1986) and Rule 56, Federal Rules of Civil Procedure that: (1) there are no genuine issues as to any material fact and American States is entitled to judgment as a matter of law; (2) American States is entitled to the retained contract proceeds in the amount of $36,866.80 for the reasons set forth herein; (3) American States is entitled to prejudgment interest on the amount of $36,866.80 from November 4, 1982, at the rate of 10% pursuant to West Virginia Code § 56-6-31; (4) American States shall be entitled to post-judgment interest pursuant to West Virginia Code § 56-6-31; and (5) Marion County Commission's actions complained of herein, do not rise to the level of a constitutional violation; therefore, under the circumstances presented, American States shall not be entitled to an award of attorney fees.

It is therefore ORDERED that American States' motion for summary judgment is hereby granted.

Judgment shall be entered in accordance with the provisions of this Opinion.

The Clerk is directed to transmit certified copies of this Order to counsel of record herein

ENTER:

WILLIAM M. KIDD
UNITED STATES DISTRICT JUDGE

APPENDIX C

Internal Revenue Code of 1954 (26 U.S.C.), as amended and as in effect for the years at issue, unless specifically noted otherwise:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

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SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

*****

(c) *Enforcement of Levy.*—

(1) *Extent of personal liability.*—Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with the costs and interest on such sum at an annual rate established under section 6621 from the date of such levy (or, in the case of a levy described in section 6331(d)(3), from the date such person would otherwise have been obligated to pay over such amounts to the taxpayer). Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) *Penalty for violation.*—In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(d)—*Effect of Honoring Levy.*—Any person in possession of (or obligated with respect to) property or rights to

property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (c)(1) shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment. In the case of a levy which is satisfied pursuant to subsection (b), such organization shall also be discharged from any obligation or liability to any beneficiary arising from such surrender or payment.

* * * * *

Under Pub. L. 100-647 (TAMRA), former section 6332(d) was replaced, as of July 1, 1989, by section 6332(e) which provides as follows:

(e) *Effect of Honoring Levy.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1) shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.

* * * * *

SEC. 6343. AUTHORITY TO RELEASE LEVY AND RETURN PROPERTY.

(a) *Release of Levy.*—It shall be lawful for the Secretary, under regulations prescribed by the Secretary, to release the levy upon all or part of the property or rights to property levied upon where the Secretary determines that such action will facilitate the collection of the liability, but such release shall not operate to prevent any subsequent levy.

(b) *Return of property.*—If the Secretary determines that property has been wrongfully levied upon, it shall be lawful for the Secretary to return—

(1) the specific property levied upon,

(2) an amount of money equal to the amount of money levied upon, or

(3) an amount of money equal to the amount of money received by the United States from the sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 9 months from the date of such levy. For purposes of paragraph (3), if property is declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

(c) *Interest.*—Interest shall be allowed and paid at the overpayment rate established under section 6621—

(1) in a case described in subsection (b)(2), from the date the Secretary receives the money to a date (to be determined by the Secretary) preceding the date of return by not more than 30 days, or

(2) in a case described in subsection (b)(3), from the date of the sale of the property to a date (to be determined by the Secretary) preceding the date of return by not more than 30 days.

SEC. 6532. PERIOD OF LIMITATION ON SUITS.

* * * * *

(c) *Suits by Persons Other than Taxpayers.*—

(1) *General Rule.*—Except as provided by paragraph (2), no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy or agreement giving rise to such action.

(2) *Period when Claim is Filed.*—If a request is made for the return of property described in section 6343(b), the 9-month period prescribed in paragraph (1) shall be extended for a period of 12 months from the date of filing of such request or for a period of 6 months from the

date of mailing by registered or certified mail by the Secretary to the person making such request of a notice of disallowance of the part of the request to which the action relates, whichever is shorter.

SEC. 7426. CIVIL ACTIONS BY PERSONS OTHER THAN TAXPAYERS.

(a) *Actions Permitted.*—

(1) *Wrongful Levy.*—If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

*****

(b) *Adjudication.*—The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) *Injunction.*—If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

(2) *Recovery of Property.*—If the court determines that such property has been wrongfully levied upon, the court may—

(A) order the return of specific property if the United States is in possession of such property;

(B) grant a judgment for the amount of money levied upon; or

(C) if such property was sold, grant a judgment for an amount not exceeding the greater of—

(i) the amount received by the United States from the sale of such property, or

(ii) the fair market value of such property immediately before the levy.

For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

*****

(g) *Interest.*—Interest shall be allowed at the overpayment rate established under section 6621—

(1) in the case of a judgment pursuant to subsection (b)(2)(B), from the date the Secretary receives the money wrongfully levied upon to the date of payment of such judgment; and

(2) in the case of a judgment pursuant to subsection (b)(2)(C), from the date of the sale of the property wrongfully levied upon to the date of payment of such judgment.

(h) *Cross Reference.*—For period of limitation, see section 6532(c).

APPENDIX D

The following are sections from the General Conditions part of Site Development Contract for the Marion County City-County Complex.

* * * * *

18.2 If the CONTRACTOR is adjudged a bankrupt or insolvent, or makes a general assignment for the benefit of its creditors, or if a trustee or receiver is appointed for the CONTRACTOR or for any of its property, or if CONTRACTOR files a petition to take advantage of any debtor's act, or to reorganize under the bankruptcy or applicable laws, or repeatedly fails to supply sufficient skilled workmen or suitable materials or equipment, or repeatedly fails to make prompt payments to SUBCONTRACTORS or for labor, materials or equipment or disregards laws, ordinances, rules, regulations or orders of any public body having jurisdiction of the WORK or disregards the authority of the ENGINEER, or otherwise violates any provision of the CONTRACT DOCUMENTS, then the OWNER may, without prejudice to any other right or remedy and after giving the CONTRACTOR and its surety a minimum of ten (10) days from delivery of a WRITTEN NOTICE, terminate the services of the CONTRACTOR and take possession of the PROJECT and of all materials, equipment, tools, construction equipment and machinery thereon owned by the CONTRACTOR, and finish the WORK by whatever method the OWNER may deem expedient. In such case the CONTRACTOR shall not be entitled to receive any further payment until the WORK is finished. If the unpaid balance of the CONTRACT PRICE exceeds the direct and indirect costs of completing the PROJECT, including compensation for additional professional services, such excess SHALL BE PAID TO THE CONTRACTOR. If such costs exceed such unpaid balance, the CONTRACTOR will pay the difference to the OWNER. Such costs incurred by the OWNER will be determined by the ENGINEER and incorporated in a CHANGE ORDER.

* * * * *

23.1 Neither the CONTRACTOR nor the OWNER shall sell, transfer, assign, or otherwise dispose of the Contract or any portion thereof, or of any right, title or interest

therein, or any obligations thereunder, without written consent of the other party.

*****